Trump Plaza Associates d/b/a Trump Plaza Hotel and Casino *and* Sports Arena and Casino Employees Union Local 137, a/w Laborers' International Union of North America, AFL–CIO. Cases 4–CA–20079 and 4–RC–17676

April 22, 1993

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions and cross-exceptions filed to the judge's decision in this case present the issues of whether the Respondent in the context of a union organizing campaign: solicited employee grievances with the implied promise of rectifying them; unlawfully applied its no-solicitation/distribution rule; interrogated an employee concerning his union activities; engaged in surveillance of union activity; and granted wage benefits in order to influence the outcome of the pending representation election.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

The General Counsel excepts, inter alia, to the judge's failure to find that the Respondent unlawfully solicited grievances and unlawfully promised to resolve them in a series of meetings held in late August 1991.

The credited evidence establishes that at one of these meetings a blackjack dealer complained about a supervisory practice known as ''sweating money.''[3] William Velardo, the Respondent's senior vice president of casino operations, responded that he would not tolerate ''sweating money'' and, if such a practice was brought to his attention and found to exist, the offender would be discharged. Velardo further stated that he had previously told supervisors that he would not tolerate ''sweating money.''[4]

The judge found that neither Velardo's statement of a previously existing lawful policy nor his request that employees cooperate in the enforcement of the policy by reporting infractions conveyed any unlawful promise or otherwise violated the Act. We disagree.

The record contains no evidence that this policy had ever been communicated to employees prior to this meeting or that this policy had ever been enforced. At the meeting, the Respondent informed employees of the policy, invited them to assist in its enforcement, and promised harsh punishment for violations of the policy. Under these circumstances, Velardo's statements, made in response to employee complaints at a meeting to discuss the Union's organizing campaign, committed the Respondent to specific corrective action. The Respondent thereby violated Section 8(a)(1) and interfered with the employees' freedom of choice in the election. See *Reliance Electric Co.*, 191 NLRB 44 (1971).[5]

ORDER

The National Labor Relations Board orders that the Respondent, Trump Plaza Associates d/b/a Trump Plaza Hotel and Casino, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising to remedy employee grievances in order to influence the outcome of a pending representation election.

(b) Maintaining and enforcing a rule prohibiting off-duty employees from distributing union literature in nonworking areas where there is no justifiable business reason therefor.

(c) Monitoring the union activity of an employee.

(d) Removing prounion literature from nonwork areas while permitting antiunion literature distributed by employees to remain in the areas.

(e) Refusing to permit an employee to place prounion literature in a work area where the placement of antiunion literature by employees was tolerated.

(f) Interrogating an employee concerning where he was going to engage in union activities.

(g) Granting retroactive holiday pay to employees during the pendency of a representation election for the purposes of discouraging union support and inducing the employees to vote against the Union.

[1] On July 23, 1992, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Supervisor Marian Woerner engaged in unlawful surveillance of employee Mitchell Goldstein, we find that this issue was fully litigated at the hearing although not specifically alleged in the complaint.

[3] The phrase ''sweating money'' refers to supervisory harassment of a dealer because the dealer's gaming station is losing money.

[4] The judge credited Velardo's testimony that he had in fact so instructed the supervisors as early as May 1991.

[5] In light of this finding, we find it unnecessary to pass on the remaining complaint allegations regarding the Respondent's August 1991 meeting with employees. These allegations concerned alleged promises to rectify other perceived problems. The allegations are therefore cumulative.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Atlantic City, New Jersey facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 4–RC–17676 is set aside and that Case 4–RC–17676 is remanded to the Regional Director for Region 4 for the purpose of conducting a new election pursuant to the following direction.

[Direction of Second Election omitted from publication.]

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Sports Arena and Casino Employees Union Local 137, a/w Laborers' International Union of North America, AFL–CIO or any other labor organization, by granting you backpay or other benefits in order to encourage you to vote against a union.

WE WILL NOT solicit employee grievances with the implied promise of rectifying them in order to encourage you to vote against a union.

WE WILL NOT maintain or enforce any rule prohibiting off-duty employees from distributing union literature in nonworking areas where there is no justifiable business reason therefor.

WE WILL NOT engage in surveillance of your union activity.

WE WILL NOT disparately enforce any rule concerning the distribution or posting of literature against employees engaged in union activity.

WE WILL NOT interrogate you concerning your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

Barbara O'Neill and *Juditra Burgess, Esqs.*, for the General Counsel.

Deborah G. Pitcher, Esq. and *Peter S. Pantaleo, Esq. (Pantaleo & Lapkin)*, of Washington, D.C., for the Respondent.

David Seliger, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated proceeding was litigated before me at Philadelphia, Pennsylvania, on April 6, 7, and 8, 1992, pursuant to charges filed against Respondent by the Union on September 17 and amended on November 12 and December 5, 1991,[1] complaint issued on December 5 and subsequently amended, and a report on objections to election issued on March 31, 1992. It is alleged in the amended complaint that Respondent in several ways violated Section 8(a)(1) of the National Labor Relations Act (the Act) and violated Section 8(a)(3) by a retroactive holiday backpay grant. The objections to the election are based on unfair labor practices alleged in the complaint. Respondent denies it committed any of the alleged violations of the Act or objectionable conduct with respect to the election in Case 4–RC–17676.

On the entire record,[2] and after considering the testimonial demeanor of the witnesses and the posttrial briefs filed by the parties, I make the following

[1] All dates are 1991 except where otherwise noted.

[2] At trial General Counsel offered pp. 2 through 5 of a position letter submitted by Respondent's counsel on October 8, 1991. The document was marked as G.C. Exh. 36, rejected, and placed in the rejected exhibits file. On reconsideration, I am persuaded it was error to reject G.C. Exh. 36 which contains statements arguably material to issues before me. Accordingly, that exhibit is received in evidence. *Massillon Community Hospital*, 282 NLRB 675 fn. 5 (1987); *Optica Lee Borinquen, Inc.*, 307 NLRB 705 fn. 6 (1992).

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

Respondent is, and has been at all times material to this proceeding, a New Jersey general partnership operating a hotel and casino in Atlantic City, New Jersey. Respondent derived gross revenues in excess of $500,000 from the operations during the year preceding the issuance of the complaint and, during the same period, purchased and received goods valued in excess of $50,000 directly from points outside the State of New Jersey. Respondent has been at all times material to this proceeding an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORS AND AGENTS

The complaint, as amended, alleges as follows:

> At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:
>
> Kevin DeSanctis—President and Chief Operating Officer
> William Velardo—Senior Vice President of Casino Operations
> Marie Haggerty—Vice President of Human Resources
> George Papanier—Director of Finance
> Craig Keyser—Director of Industrial Relations
> Jose Casteneda—Casino Manager
> William Bradshaw—Senior Casino Game Shift Manager
> Dante Benevenuto—Pit Manager
> Frank Shapiro—Pit Manager
> Marian Woerner[3]—Pit Manager
> Thomas Sparks—Director of Security

Respondent admits that the named persons, except Jose Casteneda who resigned as casino manager on September 29, 1991, had the job titles set forth after their names and were Respondent's employees at all times material to the complaint. Respondent neither admits nor denies in its answers to the complaint and complaint amendments that these persons were supervisors within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act.

Section 102.20 of the Board's Rules and Regulations provides as follows:

> All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

Respondent has not specifically denied, explained, or claimed lack of knowledge in its answers. In the absence of a showing of good cause to the contrary, the allegations that the above-named persons were, at all times material to this proceeding, supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act are deemed admitted and are found to be true.

IV. CONTEXT, CREDIBILITY, AND ALLEGATIONS

A. *Context*

The allegations of unfair labor practices and conduct affecting the results of a representation election set forth in the complaint in Case 4–CA–20079 and the Regional Director for the Board's Region 4 in his report on objections in Case 4–RC–17676 are alleged to have taken place in July, August, and September 1991 during a period of union efforts to organize certain of Respondent's employees, and the filing and processing of the petition for a representation election in Case 4–RC–17676 and charges in Case 4–CA–20079. A brief description of these activities is sufficient to demonstrate the general chronological context within which the matters at issue should be considered.

Union organizing at Respondent's facility described above began with a meeting between the Union and Mitchell Goldstein, a full-time blackjack, craps, and roulette dealer at Respondent's casino, in May 1991. After discussing the possibilities of union representation with union representatives, Goldstein, brought other employees to meet with the union agents and thereafter wrote and distributed prounion literature at the casino and passed out cards authorizing the Union to represent the signatory employees. Goldstein estimates he distributed about 40 or 50 different items totaling some 400 or 500 copies. He clearly was the most active and publicly conspicuous union activist during the period involved in this proceeding.

On July 17, the Union filed a petition with the Board's Region 4 in Case 4–RC–17676 seeking certification in a unit of Respondent's employees including full and regular part-time dealers at the casino, and excluding, among others, ''dual rate employees.'' On August 1, the Union filed an amended petition enlarging the unit of employees sought to include full and regular part-time dealers and ''dual rated dealers.'' On the same day, August 1, Respondent and the Union executed a Stipulated Election Agreement, subsequently approved by the Regional Director on August 8, setting a representation election for September 20 and 21 in a unit of ''All full-time and regular part-time dealers and dual-rated dealers employed at [Respondent's] Atlantic City Casino.''

On September 17, the Union filed unfair labor practice charges against Respondent in Case 4–CA–20079.

The election in Case 4–RC–17676 was conducted, as agreed, on September 20 and 21, but the ballots were impounded because the unfair labor practice charges had been filed on September 17. Amended and second amended charges were filed by the Union in Case 4–CA–20079 on

[3] Marian Woerner's name is spelled as corrected by Respondent.

November 12 and December 5, respectively. The complaint in Case 4–CA–20079 issued on December 5 and was amended on March 27, 1992. On March 9, 1992, the Union filed a request to proceed in Case 4–RC–17676 and, therefore, the ballots were opened and counted on March 24, 1992, showing 266 votes for the Union and 287 against, with 2 challenged ballots which were insufficient to affect the results of the election. The Union then filed objections to conduct affecting the results of the election on March 26, 1992. As previously noted, the Regional Director issued his Report on Objections to Election and Notice of Hearing on March 31, 1992. The objections in Case 4–RC–17676 involve conduct alleged to be unfair labor practices in Case 4–CA–20079 and the two cases were therefore consolidated on April 1, 1992, for purposes of hearing.[4]

B. *Credibility*

In comparing testimony on critical events, I have noted circumlocutions, evasiveness, failures of recall, certainty or lack of it, failures to directly meet opposing testimony, possible embellishment of the facts, and comparative testimonial demeanor of the witnesses in terms of apparent candor and general believability, as well as the fact some testimony was adduced by leading questions on direct examination which reduces its evidentiary worth. See, e.g., *H. C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977). The fact that some witnesses were testifying contrary to the interests of their current employer and thus were not likely to have been deliberately fabricating that testimony because they were, in effect, testifying against their own interest by contradicting those who control their future employment has been noted. See, e.g., *Uarco Industries*, 197 NLRB 489, 491 (1972). I have also credited parts of certain witnesses' testimony although rejecting other portions. This is neither unusual nor improper, *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). In some instances I have concluded that witnesses were honestly testifying to what they believed another meant rather than testifying to what was actually said, a not uncommon phenomenon, and that these perceptions have, over time, ripened into mistaken certainty concerning the words used.

C. *Alleged Unfair Labor Practices*

The alleged violations of the Act are dealt with seriatim in the order they appear in the amended complaint.

> Paragraph 5. On or about August 20, 1991, in meetings with employees at the Hotel/Casino, the Respondent, acting through William Velardo, (a) solicited its employees complaints and grievances, thereby promising them improved terms and conditions of employment in order to discourage them from selecting the Union as their bargaining representative; (b) promised to resolve an employee's complaint concerning Pit Bosses ''sweating money'' in order to discourage the employees from selecting the Union as their bargaining representative; and (c) promised to provide employees with better scheduling arrangements in order to discourage the employees from selecting the union as their bargaining representative.

In the latter part of August and early September Velardo held a series of small group meetings with employees for the purpose, according to Velardo, of discussing the consequences of unionization and providing employees with information they needed to know about it. Notwithstanding that this may have been Velardo's intention, the employees seized on the opportunities presented by these meetings to air their personal complaints about their current working conditions and benefits. Velardo recalls, consistent with the recollections of employees Lisa Buttari, Louis Monroe, and Nat Prattico, each of whom attended a different small group meeting, that there was discussion of mistreatment by supervisors including ''sweating money,''[5] scheduling, communications with management, and pay scales. Velardo credibly testified that he did not ask the employees to voice their problems, and that the employees spontaneously raised their complaints. He did, however, although unexpectedly, furnish the forum for these questions and, although I find he did not elicit questions of the nature raised, he honored the questions by speaking to them rather than declining to comment and thereby encouraged employees to continue to express their concerns. At the time of these meetings the Respondent and the Union had executed the stipulation for a representation election. The rule to be followed in evaluating whether Respondent made unlawful promises after soliciting employee complaints and grievances has been succinctly set forth in *Uarco, Inc*., 216 NLRB 1, 1–2 (1974), as follows:

> [T]he solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action: the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

Louis Monroe credibly recalls that a blackjack dealer complained about supervisors ''sweating money'' and harassing dealers, to which Velardo responded that he would not tolerate ''sweating money'' and, if brought to his attention, the offender would be discharged. Nat Prattico remembers Velardo stating he did not want anyone sweating money. Velardo agrees that he did tell the employees that he wanted to know if there was any further sweating of money. I credit Velardo that he also told them that he had already told super-

[4] At trial counsel for the Union made it clear that the Union was only pressing objections to the conduct of the election which were also alleged as unfair labor practices in the amended complaint before me.

[5] The phrase ''sweating money'' refers to supervisory harassment of a dealer because the dealer's gaming station is losing money.

visors that he would not tolerate ''sweating money,'' and further credit him that he had in fact as early as late May instructed supervisors that ''sweating money'' was unacceptable. I am persuaded that all Velardo did with respect to the ''sweating money'' issue was advise the employees who raised the issue that existing policy prohibited ''sweating money,'' would be enforced against supervisors found to be engaged in such a practice, that supervisors had been so instructed, and that any such harassment should be reported to him. The statement of an existing policy not shown to have been adopted for reasons prohibited by the Act had no reasonable tendency to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act and does not violate the Act,[6] nor does the request that employees cooperate in the enforcement of this policy by reporting infractions thereof convey any unlawful promise or otherwise violate the Act.

Buttari, Monroe, and Prattico all testify that Velardo responded to employee questions concerning scheduling problems. Prattico recalls Velardo saying he would look into it and see if employees could be more effectively scheduled. Monroe remembers Velardo saying he would check into the scheduling and was planning on changing the scheduling in any event. According to Buttari, Velardo said scheduling had to be examined. Velardo testified that during the meetings he told employees there might be a creative way of addressing scheduling problems, but he could not do that during the employee campaign. Velardo is credited that he so told employees at some time during the several meetings held, but the three employees are also credited that Velardo made the statements they report at meetings they attended. The comments of Velardo that he would look into, check into, and/or examine the scheduling are noncommittal, do not convey a promise to adjust scheduling in a way either responsive to employees' expressed dissatisfaction or favorable to employees, and do not violate the Act.[7]

With respect to the general allegation that Velardo solicited and promised to remedy employee complaints and grievances, I find he did not so solicit or promise. At most, he inadvertently provided a forum where employees, contrary to his expectations, raised issues concerning wages, hours, and conditions of employment, and arguably encouraged them to continue in this manner by not terminating the meeting, by responding in the manner described above, and failing to effectively redirect their attention to the original purpose of the meeting. Nevertheless, I am not persuaded this acquiescence in the employee takeover of the subject matter of the meeting rises to the level of an unfair labor practice, and I shall recommend all the allegations raised in paragraph 5 of the complaint be dismissed.

> Paragraph 6. On or about September 9, 10, and 11, 1991, the Respondent, acting through William Velardo and Craig Keyser, in meetings with employees at the Hotel/Casino: (a) threatened to institute a no-tipping policy for its employees if they selected the Union as their bargaining representative; and (b) threatened to discontinue the Respondent's practice of allowing part-time employees to ''pick up days'' from full-time employees.

Here the General Counsel relies on the testimony of employees Monroe, Buttari, and Hilyard concerning item (a) which is based on statements by Craig Keyser, Respondent's manager of industrial relations at the time, made at the first of a series of three large group meetings conducted by Velardo and Keyser on September 9–11. Keyser utilized a prepared text in addressing the employees. Louis Monroe testified:

> A. Well, he was explaining to us how collective bargaining worked and that once we entered into negotiations, that we relatively would walk in there with a blank piece of paper. All of our benefits, sick pay, health benefits, everything would be obliterated. We would no longer have none of this. We'd have to negotiate for it.
>
> And he went on to say that, you know, if the union did come in, that they could post a no tipping policy, and that was like a very hard hit blow, and I intervened and told him that he couldn't do it, and he said he could, and we went back and forth and—for a little while, and it ended like that, and then he went on and continued his presentation. John Hilyard testified as follows:
>
> A. [Keyser] explained to us that if the union was brought in, how they would have to sit down and they would back and forth negotiate different things that would be included in the contract.
>
> One of the statements that he made was that if the union had been voted in and was recognized as our bargaining agent, that they would take the stance of having a no tipping policy, negotiate that clause.
>
> JUDGE WOLFE: Who would—who would take the stance of no tipping?
>
> THE WITNESS: Management.
>
> By Ms. Burgess:
>
> Q. Did Mr. Keyser appear to be reading from a text?
> A. Yes.

Lisa Buttari testified:

> Craig Keyser got up and he's reading off his list about during negotiations we start out with a blank piece of paper and we may end up with less than what we have now. He didn't mention the fact that we may end up with more. And he also mentioned that our tokes may be taken away from us.
>
> And then Louis Monroe said that that was a lie and Bill Velardo said please do not interrupt during this meeting. All questions will be answered at the end of the meeting.

According to Keyser, he never deviated from reading his prepared speech except for the brief exchange with Louis

[6] In assessing the various allegations of violations of Sec. 8(a)(1) of the Act, I have in each instance applied the reasonable tendency rule which has long been the established test for such allegations. See, e.g., *G. H. Hess, Inc.*, 82 NLRB 463 fn. 3 (1949), and *Waco, Inc.*, 273 NLRB 746, 748 (1984).

[7] Compare *Radio Broadcasting Co.*, 277 NLRB 1112, 1113 (1985); *Kinder-Care Learning Centers*, 284 NLRB 509, 516 (1987), where the employer's comments were not mere responses to employee questions.

Monroe concerning his remark about tokes.[8] The testimony of Buttari and Monroe that Keyser referred to a blank piece of paper, together with the testimony of Nat Prattico, that Keyser said negotiations started with a blank page and the fact that the prepared presentation contains no reference to a blank page or piece of paper, suggests that Keyser may have deviated from his text and made some such statement. Weighing this possibility against Keyser's apparent candor when he testified that his only deviation was the Monroe incident, the fact that Hilyard, who attended the same meeting, gave no testimony concerning a blank page or piece of paper, the agreement of Buttari and Hilyard that Keyser read from a prepared text, and the absence of any apparent reason for Keyser to deviate from a carefully prepared statement except when challenged by Monroe, I am persuaded that the evidence does not preponderate in favor of a conclusion that he made the blank-page or piece-of-paper statement. Keyser was a believable witness when he testified that he did not deviate other than in the one instance and this testimony is credited. Moreover, the complaint neither originally or as amended alleges Respondent violated the Act by referring to a blank page, blank piece of paper, nor anything similar. For the foregoing reasons the contention in General Counsel's brief that Respondent violated the Act by making such statements is rejected.

The overall message in the prepared speech delivered by Keyser is that all terms and conditions of employment are subject to good-faith negotiation, and that any union claims to the contrary are untrue. In that context, the written speech states:

> We may make a proposal on any issue we feel appropriate. So, we could propose:
>
> - a reduction in benefits
> - a cut in pay
> - elimination of such pay
> - [• we could even propose to estimate tokes[9]]
>
> I am not saying we would do any of these things. I am saying that we certainly have the right to propose such things and if we did, you could lose something you already have. Again, when the union tells you that you can't lose there [sic] are either lying or don't know any better. Either way, you should not vote for them.

This is what Keyser read to the employees and it does not, standing alone, constitute a threat to institute a no-tipping policy if employees select union representation, nor does it constitute such a threat when viewed in context with the rest of the speech as it properly should be.[10] Furthermore, the testimony of Buttari and Hilyard reflects that they understood Keyser to be saying that the toke system was subject to negotiations in a collective-bargaining context. This does not support any inference that might be drawn from Monroe's testimony that Keyser fairly implied Respondent could, would, or might unilaterally cancel the tipping system. I draw no such inference, and the allegation that Respondent threatened to retaliate against the selection of union representation by abolishing tokes is dismissed.

The allegation in section (b) of paragraph 6 is based on the testimony of Nat Prattico, a part-time dealer who admits to faulty recollection, that at a subsequent meeting ''there was something said about—now that she[11] brought it up, there was—there was a discussion of—that if the union was voted in, at one point, that they may not allow full time—part time dealers to pick up days from full time dealers . . . .'' He cannot remember who said this, but says it was either Velardo or Keyser. This testimony is ambiguous, clearly uncertain, elicited by a leading question, and not impressive. Velardo's bare denial that neither he nor Keyser made any reference to part-time dealers at any of the three group meetings on September 9–11 is as credible as Prattico's uncertain recollection, there is nothing to choose from in terms of comparative demeanor on this subject and General Counsel has not shown by a preponderance of the evidence that the alleged threat was made. The allegation is therefore dismissed.[12]

> 7. During the period from July 17, 1991, to September 20, 1991, the Respondent interfered with employees' distribution of Union literature by engaging in the following acts and conduct:
>
> (a) Acting through Dante Benevenuto . . . refused to allow Union literature in the pits while permitting anti-Union literature to remain in the pits.
>
> (b) On or about September 3, 1991, acting through Frank Shapiro (i) followed an employee who was distributing Union literature in the dealers' lounge; (ii) removed Union literature left by the employee in the dealers' lounge; (iii) removed Union literature from the bulletin board in the dealers' lounge while permitting anti-Union literature to remain in the dealers' lounge; and (iv) interrogated an employee concerning the employee's Union activities.
>
> (c) In early September, 1991, a more precise date being presently unknown to the General Counsel, acting through Marian Warner, removed Union literature from the dealers' lounge while permitting anti-Union literature to remain in the dealers' lounge.
>
> (d) About September 3, 1991, at the employee entrance to the Hotel/Casino on Columbus Avenue, between 6:00 and 7:00 p.m., Respondent, acting through Thomas Sparks, directed an employee who was on the sidewalk near the employee entrance to the Hotel/Casino to cease distributing Union literature on the Respondent's property.
>
> (e) About September 10, 1991, at the employee entrance to the Hotel/Casino on Columbus Avenue, between 6:00 and 7:00 p.m., Respondent, acting through

[8] ''Tokes'' is used by the casino personnel including management as a synonym for money tips received from customers and shared in by all employees in proportion to their hours worked. This can amount to considerably more than 50 percent of their total income.

[9] The statement in brackets supplied by was eliminated after the first speech on September 9 and not repeated at the succeeding meetings, during which Velardo told employees that Keyser had made the statement only to emphasize the possible scope of negotiations. Velardo also told the employees the idea of no tipping was absurd, casinos could not exist without it. Velardo explains he did so because Keyser's statement at the first meeting caused a hostile reaction from the employees.

[10] *Arch Beverage Corp.*, 140 NLRB 1385 (1963).

[11] ''She'' refers to counsel for the General Counsel.

[12] *Blue Flash Express*, 109 NLRB 591 (1954).

a Respondent security guard whose name is presently unknown to the General Counsel, directed two employees to cease distributing Union literature on the Respondent's property.

(a) Mitchell Goldstein credibly testified that about a week before the September 20 election he observed that there was some antiunion literature bearing a ''Raw Deal'' heading[13] in one of the casino pits which are designated areas for games of chance. He then pointed out the presence of the literature to Dante Benevenuto, pit manager and statutory supervisor, and asked permission to put union literature in the pit. Benevenuto said he could not. Benevenuto recalls he has seen both pro-and antiunion literature in the pits or the dealers' lounge, but denies Goldstein ever asked for permission to distribute prounion literature in the casino pits. Benevenuto's denial is not credited.

Respondent correctly notes, citing *St. Francis Hospital*, 263 NLRB 834, 835 (1982), which cites *NLRB v. Steelworkers USW (Nutone, Inc.)*, 357 U.S. 357, 362 (1958), that no-solicitation, no-distribution rules are not binding on employers, but this principle is not applicable in this instance because the ''Raw Deal'' literature was prepared and distributed by an employee on behalf of ''Workers against Local 137 Representation,'' not the Employer. There is no evidence that Benevenuto took any immediate steps to remove the ''Raw Deal'' literature from the pit when Goldstein brought it to his attention. Here we have an instance of disparate treatment, antiunion literature left undisturbed and similar placement of prounion literature denied, but this is not an isolated instance as discussion below of other instances demonstrates.

With respect to (b) and (c), Goldstein credibly and in some detail testified to contacts with statutory supervisors Frank Shapiro and Marian Woerner[14] on the same day.[15] About 1 or 2 o'clock that day, Goldstein, in response to a document posted in the dealers' lounge, a nonwork area, which urged a vote against union representation, taped a prounion response to the edge of the scheduling board, put one on the bulletin board where employees advertise items and personal services they wish to sell, and laid copies on the cigarette machine and a table in the lounge. Goldstein acknowledges the scheduling board is where the supervisors and rank and file go to ascertain their schedule, but explains his posting on the edge of that board did not obscure the posted schedule.

As Goldstein was performing this distribution, he noted that Shapiro was behind him holding the six or seven pieces of literature Goldstein had to that point posted and laid about. As Goldstein turned toward him, Shapiro asked where Goldstein was going next, which drew the reply that Goldstein was going ''around the other side.'' To this, Shapiro said, ''Well, I have to follow you.'' Goldstein then said he guessed he would stop. Shapiro then gave Goldstein the literature Shapiro had retrieved after Goldstein distributed it.

Shapiro agreed he did once remove one piece of literature posted by Goldstein over a management sign in a glass frame, does not recall taking a pile of prounion literature and giving it to Goldstein, says he never told Goldstein he was following him, never in fact followed Goldstein, and concedes he did ask Goldstein where he was going next. Shapiro explains he asked the question concerning Goldstein's next move because he had just taken a Goldstein posting down, there was resulting tension, and Shapiro was curious concerning whether Goldstein was going to post ''on top of all the other things.'' This latter reference to the possibility of subsequent posting on ''all the other things'' confirms Goldstein in fact had many copies of his posting in hand and supports Goldstein's version he had been distributing many copies when confronted by Shapiro. Shapiro is not sure whether he returned the paper he removed to Goldstein, but thinks he put it in the trash. Shapiro was not a convincing witness and he is not credited where his testimony contradicts that of Goldstein, a current employee whose testimonial demeanor was more impressive in terms of certainty, lack of hesitation, and apparent candor.

Later that same day, reports Goldstein, about 4 o'clock, he returned to the lounge and, as before, posted the same literature and laid copies about in the same places he previously had. The fact he redistributed the same amount of literature supports his testimony that Shapiro collected all he had previously posted and laid out. This time Marian Woerner removed the literature that he had posted and laid on the tables.

Woerner agrees she removed about three pieces of prounion literature Goldstein had scotch-taped to the scheduling board, to a glass-covered poster put up by Respondent, and in the stairway to the casino from the dealers' lounge. She gives as reason for the removal that the items were posted in a nonposting area. She does not recall if the schedule was obscured by Goldstein's posting, and concedes that employees occasionally post items on the stairway wall. Her testimony does not speak to Goldstein's claim she also removed the copies he laid around in the lounge. Goldstein is credited that she, as did Shapiro, also removed those documents.

No one explains how it happened that Shapiro and Woerner were so close on Goldstein's distribution which occurred during his breaktime. The immediate removal by the two supervisors of the Goldstein-placed documents suggests close monitoring of Goldstein's conduct because he was known to be, as the record shows he was so known, a leading prounion activist in Respondent's employ. Suspicion is not evidence, but almost immediate retrieval of the literature by Shapiro and Woerner strikes me as a most unusual and unlikely coincidence suggesting preplanning and possible surveillance of prounion activity. That the ''following'' of Goldstein was not pure happenstance is shown to have been a planned course by Shapiro's statement that he had to follow Goldstein.

In contrast, according to the unrebutted testimony of Hilyard and Monroe, there were several ''Raw Deal'' leaflets

[13] Contrary to Respondent's argument in its posttrial brief, Goldstein did identify the document as a ''Raw Deal'' item. See Tr. pp. 127–128.

[14] The parties agree Woerner is misspelled in the complaint.

[15] The exact day is uncertain. Goldstein thinks it was September 2 or 3. Shapiro states this cannot be because he was on vacation that week. Neither Shapiro nor Woerner hazards a guess as to when the incidents in question took place. I find they took place during the preelection period after the August 8 approval of the election agreement because the notice which drew Goldstein's attention and inspired his distribution of literature on the day he met with Shapiro and Woerner urges employees to vote no.

placed in the dealers' lounge. Similarly unrebutted testimony of Buttari places numerous postings of ''Raw Deal'' documents on locker room and employee entrance-way walls. There is no showing the placement of ''Raw Deal'' documents in these areas was in any way curtailed.

Respondent has a solicitation/distribution rule which reads, in relevant part, as follows:

> Solicitation at any time by employees in public areas on Trump Plaza premises is prohibited. Solicitation or distribution of any type of literature or products to employees in working areas during working time is prohibited.
>
> ''Working time'' does not include break periods and meal times or other specified periods during the work day when employees are properly not engaged in performing their duties.

The dealers' lounge and the adjacent stairway have not been shown to be public or work areas, and, as the use of a bulletin in the lounge to advertise services and items for sale shows, it has not been treated as a public or working area.

Three issues are presented by items (a) and (b) and the evidence relating thereto: (1) Was disparate treatment accorded the attempts to circulate and/or post prounion literature? (2) Were Woerner and Shapiro engaged in unlawful surveillance of prounion activity when they followed Goldstein? (3) Was Goldstein coercively interrogated by Shapiro concerning his union activities? The answer to each question, based on the evidence before me, must be affirmative. When Benevenuto denied Goldstein's request to place prounion literature in a pit where a ''Raw Deal'' document was present, and there is no probative evidence Benevenuto made any effort to remove the ''Raw Deal'' document or caused it to be removed, Benevenuto, and thus the Respondent,[16] gave less favorable treatment to prounion distribution than to antiunion distribution and by this disparate treatment violated Section 8(a)(1) of the Act. Similarly, the conduct of Woerner and Shapiro in removing prounion literature lying on a table and a cigarette machine in a nonworking area where such distribution is permissible under Respondent's written rule, and by removing such literature from a bulletin board utilized by employees for all sorts of sales of goods and service, all without any evidence of uniform treatment of antiunion literature which appears from the record to have been permitted on the walls in locker rooms and hallways and to have been freely distributed in the dealers' lounge without any disturbance so far as the record shows, require a finding of disparate treatment violative of Section 8(a)(1) based on a preponderance of the credible evidence. I further find Respondent violated Section 8(a)(1) by the conduct of Shapiro and Woerner in following Goldstein during his breaktime in order to observe and frustrate his protected union activity, and thus engaging in unlawful surveillance of that activity, and by Shapiro's conduct in telling Goldstein, after inquiring where he was going next and thus unlawfully interrogating him concerning where he would next carry out his prounion efforts, that Shapiro had to follow him, a plain announcement to Goldstein that his union activities were under surveillance clearly tending to interfere with, coerce, and restrain Goldstein in the exercise of his rights guaranteed by Section 7 of the Act.

Subparagraphs (d) and (e) have to do with alleged interference with the right of off-duty employees to distribute union literature on Respondent's property. At the end of August or early in September, John Hilyard, an off-duty employee, stood with another off-duty employee on the sidewalk about 7 or 8 feet from the employee entrance to Respondent's facility and handed union literature and authorization cards to incoming employees about 6 p.m. as they exited the shuttle bus from Respondent's parking lot and entered the building to go to work. The sidewalk is on Respondent's property but is used by the public pursuant to an easement held by the city of Atlantic City. Thomas Sparks, Respondent's director of security and the only witness other than Hilyard testifying to this incident, states that although Hilyard was standing so as to partially block egress from the bus, he did not stop anyone from getting off. Sparks was in the casino when he received a report some employees were complaining of being solicited as they exited the shuttle bus. He proceeded to the scene and there met Hilyard. Sparks told Hilyard that Respondent had a no-solicitation policy and Hilyard would have to move off the sidewalk. Hilyard, who was wearing his dealer uniform, told Sparks he was off duty. That did not change Spark's instruction to leave the Respondent's property. Hilyard stepped into the street and distributed the union materials from that location.

On a later occasion, about the second week in September, Hilyard, wearing his work uniform, badge, and license, and another dealer again stood in the same spot on the sidewalk from about 5:30 p.m. distributing a union letter. At about 7 p.m., one of Respondent's security officers came out of the employee entrance and told Hilyard he could not pass out the letters on the sidewalk and would have to go out into the street. It is not clearly stated in the record, but I conclude, in the absence of any evidence of further confrontation between Hilyard and the officer, that Hilyard and his companion stepped off the sidewalk as instructed. There is no persuasive showing Hilyard blocked or tried to block the exit from the bus or entrance to the building or caused any employee to be delayed in his or her exit and entrance, or caused any other impediment to traffic, the public, or the employees of Respondent.

Respondent, in its posttrial brief, relies on that portion of its solicitation/distribution policy reading: ''Solicitation at any time by employees in public areas on Trump Plaza's premises is prohibited.'' Respondent has thus placed the validity of this rule at issue.[17] Respondent also argues that Sparks was justifiably motivated by several employee complaints about solicitation as they left the bus. With respect to the latter contention, Sparks received the information from his subordinate who received it via radio from an unidentified source who reported there were such complaints. This hearsay information is not supported by any other evidence there were such complaints, how serious they were, or employees were harassed as they left the bus. Moreover, even if the report be accurate, there is no evidence, even hearsay, of similar employee complaints concerning Hilyard's activi-

[16] *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986).

[17] *Hale Container Line*, 291 NLRB 1195, 1205 fn. 14 (1988).

ties or of any blocking of egress or ingress by him on the second occasion that he was ordered off the sidewalk.

What we have here is an issue concerning the exclusion of off-duty employees from the employer's premises. The propriety of the exclusion must be gauged in accord with the Board's statement in *Tri-County Medical Center*,[18] that a no-access rule concerning off-duty employees is valid only if it:

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

The portion of its solicitation/distribution policy that Respondent refers to may not be used to justify the exclusion of Hilyard and his employee companion from the sidewalk for several reasons. The rule is ambiguous because it does not specify whether it applies to on- and/or off-duty employees and does not define what public areas on the premises, which could encompass the entire indoor and outdoor premises or might be construed as only the indoor gaming areas where the public assembles to play. Moreover, the sidewalk is truly a public area in the broadest sense by virtue of the Atlantic City easement permitting the public, not only customers of Respondent, to utilize it. There is no evidence Respondent has any authority to eject anyone from the city's easement. The rule on its face and its application to Hilyard and company fail the tests of *Tri-County Medical* by extending the limitation of access to outside nonworking areas, and clearly denies off-duty employees access to such areas. There is no valid business reason shown for this broad exclusion and the rule and its application to Hilyard and off-duty employee companions clearly violate Section 8(a)(1) of the Act.[19] That the solicitation and/or distribution by Hilyard may have briefly annoyed some employees is not a valid reason[20] to interfere with his protected activities on a truly public sidewalk whether the ground under it is owned by Respondent.

> 8. On or about August 1, 1991, the Respondent, acting through William Bradshaw, in the Hotel/Casino, threatened an employee that the Respondent would eliminate the ''dual-rate'' position if the employees selected the Union as their bargaining representative.

According to Goldstein, he was told by Sherrie Shillingford and Ruth Cottrill, dual-rated dealers,[21] in early August that William Bradshaw, the senior shift manager and statutory supervisor, had said ''that if the Union got in, that they would take away the dual-rate status. They were going to get rid of them.''[22] Goldstein says he then went to Bradshaw and asked him if he had told the ladies that if the Union got elected in the dual-rate status would be eliminated. To which, says Goldstein, Bradshaw said, ''Yea, I said it, cause it's true.''

Bradshaw testified that, when Shillingford expressed a concern about the status of dual-rated dealers, he told her that if they voted the Union in it would be up to the management and the Union to negotiate the status of dual rates. He denies telling her there would be no dual-rated status. Bradshaw states he believed the dual-rate status might be negotiated away because in his past union experience bargaining agreements only covered line employees and not management. Bradshaw recalls Goldstein approaching him the same or following day and asking what he had told Shillingford. To which he replied as he had to Shillingford. After this conversation, he went back to Shillingford to make sure she had not misunderstood him. She had not. Bradshaw says she further stated she had told Goldstein what Bradshaw testifies he had told her, and did not want to get involved.

According to Goldstein, Shillingford and Cottrill later told him that Bradshaw had corrected his earlier statement.

Neither Shillingford nor Cottrill testified. There is no showing they were unavailable as witnesses by subpoena or otherwise. What they told Goldstein is hearsay and of no evidentiary weight. Whether he correctly understood them is also impossible to ascertain. Moreover, Bradshaw was a straightforward and believable witness whose testimony had the ring of truth and is credited over that of Goldstein whom I have credited on other matters, a not unusual situation.[23] Accordingly, the allegation in paragraph 8 of the complaint has not been proved by a preponderance of the evidence and will be dismissed.

> 9. In the first two weeks of September, 1991, a more precise date being presently unknown to the General Counsel, the Respondent, acting through Dante Benevenuto, solicited an employee's complaints and grievances thereby promising its employees improved terms and conditions of employment in order to discourage its employees from selecting the Union as their bargaining representative.

A week or two before the September 20 election, Nat Prattico was relieved from his work station and told to meet with Pit Manager Dante Benevenuto. He did so. According to Prattico, the two then had a conversation during which Benevenuto asked him what he thought some of the problems were with the hotel and casino, to which Prattico replied he thought sick pay, benefits, and insurance were problems and that employees were not receiving good enough benefits for the amount of money it cost them.

Benevenuto generally testifies that he was asking Prattico if he had any concerns ''on any of the issues that were involved with the Unions or any concerns basically he might have had that I might have addressed,'' but does not recall what concerns Prattico raised except that one question had something to do with the Union or the election campaign

[18] 222 NLRB 1089 (1976); and see *Ohio Masonic Home*, 290 NLRB 1011 (1988).

[19] *Sears Roebuck & Co.*, 300 NLRB 804 (1990).

[20] *Ohio Masonic Home*, supra at 1014.

[21] Dual-rated dealers are full-time employees who are sometimes utilized as supervisors but normally act as nonsupervisory dealers.

[22] This hearsay testimony of Goldstein was entertained, over Respondent's objection, not for the truth of what he was told but only to show what he says he was told and why he contacted Bradshaw.

[23] *NLRB v. Universal Camera*, supra.

which Benevenuto said he did not know labor law and would refer it to Keyser. Benevenuto denies telling Prattico he wanted to address his concerns.

Crediting Prattico, who makes no mention of any promise express or implied to remedy the problems, mindful of *Uarco*, supra and its progeny, and noting that Benevenuto made no statements indicating he would look into, review, or do anything at all to correct Prattico's concerns, and crediting Benevenuto that he did not tell Prattico he wanted to address his concerns, I am persuaded that inasmuch as Benevenuto made no overt or implied promise to Prattico, the mere fact Benevenuto asked Prattico to voice his concerns was not unlawful even if viewed as part of an antiunion effort.[24] Accordingly, I find Benevenuto's comments did not violate Section 8(a)(1) of the Act.

> 10. On or about September 15, 1991, the Respondent granted retroactive holiday backpay for dual-rate employees in order to discourage them from selecting the Union as their bargaining representative.

Respondent's employee manual contains the following provision:

> Full-time hourly employees who are required to work on a holiday will receive holiday pay equal to your normal shift at straight time plus time and one half for hours actually worked on the holiday. Part-time employees receive time and one half when they work on a holiday, but do not receive holiday pay for holidays on which they do not work.

On July 17, 1991, Vice President Velardo issued a memo to all floorpersons/boxpersons reading, in relevant part, as follows:

> It has come to our attention that there are concerns with your hours worked against your shift rate of pay. Some of these hours can't be helped, due to 24 hour gaming on the weekends. We would like your thoughts on the following options:
>
> *Option I*
>
> Remain with shift/daily rate and continue being paid for the 6th day.
>
> *Option II*
>
> Change from present shift rate to hourly rate.
>
> * Time and one half (1-1/2) for hours worked over 8 hours in a day.
>
> * Time and one half (1-1/2) for the 6th day.
>
> * *On Company Holidays you would receive Holiday Pay plus time and one half (1-1/2) for hours worked on the Holiday.*[25]
>
> *Early Outs*
>
> If you request to leave, you would be paid for hours worked that day. If the company asks you to leave early (*during* the first four hours of the shift) you would be paid for four hours. If the company asks you to leave *after* the first four hours, you would be paid for eight hours.

Floorpersons and boxpersons are full-time supervisors. Velardo's July 17 memo is not alleged to be unlawful, and it clearly is not. When the dual-rate employees, who are full-time employees and function at times as dealers and at other times as floorpersons or boxpersons, saw this memo they questioned why they had not been receiving the double time and a half for working holidays. Within a couple of days of the memo, Jose Casteneda[26] who was then the casino manager but left on September 29, had an information session with six or seven dual-rated employees. During this meeting, William Castorini asked if the dual-raters were going to be paid double time and a half for holiday work like all other hourly paid employees. Casteneda said he had no answer but would check into it and get back to Castorini. Casteneda did not get back to Castorini, but did discuss the matter with Velardo. Velardo credibly testified that he had not known dual-rated employees were not being paid double time and a half for holiday work until the issue was raised after the July 17 memo. This is not unusual when one recalls he had only been Respondent's employee for about 4 months by July 17. Within the next several days he decided, even though Casteneda argued that the dual-rate job was designed to be paid only double time for such work, that all hourly paid employees were entitled under the written company policy to the double time and a half. He also decided to start paying at this rate commencing the next holiday, Labor Day.

A couple of days after Velardo reached his decision to pay the double time and a half rate in the future, still in July, he was approached by Anthony Ruggieri, an hourly paid dual-rated employee, who asked why such employees were not receiving retroactive pay for holidays worked in the past. So far Ruggieri and Velardo are in essential agreement. They differ somewhat over Velardo's reply. According to Ruggieri, Velardo agreed it was not fair that the dual-raters had not been getting the higher holiday pay and added he was not certain about the payment of backpay but the employees could pursue the matter. Velardo recalls that, on the basis of Casteneda's advice the dual-rate position had been designed in the past to be paid only double time for holiday work, that he asked Ruggieri why he thought retroactive holiday pay should be forthcoming when the job had been designed to be paid as it had been paid. Velardo continues that Ruggieri denied the dual-rate position had been so designed. Whichever is correct, it is plain that Velardo had not by this time decided to pay retroactively the difference between past holiday pay received and that set forth in Respondent's employee manual. Velardo did, however, during this meeting tell Ruggieri that the double time and a half rate would be paid for holiday work in the future.

Several days later, about the first of August, give or take a day or two, Velardo was presented with a petition prepared by Ruggieri and Jimmy Ettore, another dual-rater, typed by Goldstein, and bearing 65 signatures. It reads as follows:

> We the undersigned hourly paid Dual Rates, consisting of Dual Rate dealer/floor and dealer/box, are petitioning for back pay that we feel is owed to us from the first holiday when the above category of people began being paid on an hourly basis. This petition consists of anyone holding that position during the above

[24] Compare *St. Francis Hospital*, 263 NLRB 834, 835 fn. 8 (1982).

[25] Emphasis added.

[26] Casteneda did not testify.

time frame, regardless of their present position. We feel that we were paid incorrectly for the holidays work. On page 10 of the employee handbook it clearly states:

> Full-time hourly employees who are required to work on a holiday will receive holiday pay equal to your normal shift at straight time plus time and one half for hours actually worked on the holiday.

By being paid double time on holidays does not follow company policy. Your cooperation on this matter would be greatly appreciated.

Velardo explains that during the period between his talk with Ruggieri and the receipt of the petition he had caused the payroll and human resources employees to research past documentation explaining how dual-raters were to be paid, but no evidence of any past requirement that these employees were to be paid any way other than that in the manual was found. He therefore concluded, testifies Velardo, that there had been no such rule, and he therefore set up a meeting with 25 or 30 dual-raters to discuss the matter. This testimony by Velardo concerning his conduct during the period between his talk with Ruggieri and the subsequent meeting with dual-rate employees is neither supported nor contradicted by other testimony.

The meeting with dual-rate employees took place in mid-August, probably within a day or two of August 19 when Marie Haggerty issued a memo to George Papanier, Respondent's director of finance, directing the payment to all active dual-rate dealers of backpay for holidays worked from March 1988. Velardo testified as follows, in relevant part:

> Q. What happened at that meeting?
>
> A. Well, I asked them if they could reflect back to when the job was formed, you know, if they could remember or recall anything about—about this pay, and—I asked them why they hadn't brought this issue up for—for two years, and, unanimously, not a single person in the room disagreed that it was brought up from its very beginning and had occasionally been brought up here and there but with no diligence, but that—that they were—they were never given a reason to why they were paid that way. It kept being deferred and they brought up managers' names I had never heard of, that I had never worked with, shift managers, casino managers, and evidently the issue kept getting tabled and deferred until it finally came to light again.
>
> Q. When you went into that meeting, had you already made a decision to pay them the retroactive amount?
>
> A. No.
>
> Q. When did you make the decision?
>
> A. After I asked them these questions. You know, I asked them, you know, to tell me if they could remember back, and when I heard them speak in front of me, I said okay.
>
> Q. So, you made the decision during the meeting?
>
> A. Right there at that moment, you know.

Velardo told the employees assembled they would be receiving the retroactive pay, and they did on September 15. Velardo denies the Union or the election were mentioned at the meeting. The foregoing account by Velardo is not contradicted, is supported by Ruggieri's testimony concerning what happened at this group meeting, and is credited. Velardo and Ruggieri agree, and I find, that Velardo told those present it could take quite some time to issue the backpay checks. Velardo says he said possibly 2 or 3 months. Ruggieri recalls Velardo saying a few weeks. They agree the reason stated by Velardo for the delay was the need to check the records of all the dual-raters who had worked holidays since 1988, which, I conclude, began the period during which this work was performed.

At hearing General Counsel's motion to amend the complaint to allege the prospective grant of the double time and a half rate violated Section 8(a)(3) and (1) of the Act was denied. Counsel for the General Counsel renews that motion in the posttrial brief. The pleadings show the original charge filed on September 17, the amended charge of November 12, and the amended charge of December 5 all broadly allege the grant to be unlawful and are clearly broad enough to encompass the requested amendment. The General Counsel, by the Regional Director, decided to limit his allegation to the retroactive payment when he issued the complaint on December 5. The complaint was subsequently amended in other respects on March 27, 1992, but no effort was made to allege the prospective payment of the double time and a half rate until after General Counsel had rested (at midday on April 7, 1992) and Respondent had called Velardo and Keyser as witnesses, both of whom completed their testimony that day. The following day, at the opening of the record, counsel for the General Counsel moved to amend the complaint to allege the decision to pay the rate on or after September 1, 1991, was made in order to discourage employees from selecting the Union. Respondent objected. Counsel for the General Counsel contended she had made the prospective grant an issue as an unfair labor practice in her opening statement, and she viewed the retroactive and prospective applications as a single decision.[27] The only comment by Counsel for the General Counsel in her opening statement pertaining to what was being alleged concerning the holiday pay is, ''The evidence will show that they made that decision to give them retroactive backpay back to March '88 [on] August 19, 1991, and that prior to that, they had not come forward with that. And finally, the checks were distributed on September 15th, several days before the election.''[28] This did not fairly advise Respondent or me something other than that which the complaint alleged was to be litigated. On April 7, 1992, during counsel for the General Counsel's cross-examination of Velardo, Respondent's counsel objected to questions concerning the implementation of the prospective increase on the ground it was not alleged in the complaint. Counsel for the General Counsel responded that Respondent was correct the complaint allegation did not go to the decision to pay the rate prospectively, but argued the decisions were not necessarily separate and, because the whole issue turned on timing, that the sequence of events is important. Pressed by me counsel for the General Counsel expressly stated she was not alleging the prospective change to be a violation, but viewed the elapsed time between decision and the issuance of

[27] Tr. pp. 340–346.

[28] Tr. pp. 34–35.

Haggerty's August 19 memo to be suspicious. The objection was sustained.[29] She moved to amend the following day.

Contrary to the General Counsel, neither the Respondent nor I had been given any reasonable notice the prospective grant was at issue. Counsel for the General Counsel in fact gave notice to the contrary when she expressly stated on April 7, 1992, it was not alleged as an unfair labor practice. Evidentiary rulings were made in reliance on General Counsel's representations and it cannot fairly be said the issue was fully or fairly litigated, noting that Respondent's witnesses who were particularly knowledgeable on this subject had completed their testimony at a time General Counsel had expressly disavowed any allegation of unlawful conduct concerning the prospective grant. Section 102.17 of the Board's Rules and Regulation provides that a complaint ''may'' be amended at the hearing ''upon such terms as may be deemed just.'' I do not believe permitting the requested amendment at such a late stage of the hearing, after Respondent's chief witnesses on the subject of the holiday pay had testified, and after General Counsel had agreed the prospective grant was not in issue would be just, and it is again denied.

It is well settled that the granting of benefits to employees while a representation election is pending violates Section 8(a)(1) of the Act if its purpose is to induce employees to vote against the Union.[30] As Judge Frederick U. Reel cogently observed in *McCormick Longmeadow Stone*:[31]

> An employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union were not in the picture. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act, and this is true whether he confers benefits because of the union or withholds them because of the union.

The assessment of whether an employer's grant of preelection benefits is consistent with its legal duty as described by Judge Reel begins with the established presumption stated by the Board in *Baltimore Catering Co.*[32] in the following terms and has applied consistently to date:[33]

> In the absence of evidence demonstrating that the timing of the announcement of changes in benefits was governed by factors other than the pendency of the election, the Board will regard interference with employee freedom of choice as the motivating factor. The burden of establishing a justifiable motive remains with the Employer.

Velardo is credited that he was not aware the dual-raters were not receiving the holiday pay prescribed in the employee handbook until after July 17. It seems clear they were entitled to such pay. He recognized that fact and promptly decided to make sure such wages were properly paid in the future. He then so advised Ruggieri in late July. This was prior to any request or agreement by the Union, or any other reliable indication of record, that dual-rated employees were to be included in the bargaining unit sought by the Union which, until August 1, sought to exclude those employees from the unit. This was the situation when Velardo advised Ruggieri the two and one-half rate would be applied for future holidays. The Respondent had a written document mandating such payment but, for some reason unknown by the me, it had not been abiding by the written rule. Laying aside the possibility the failure to pay the promised wage might have been actionable in a court of law, it would be manifestly unreasonable to require the Respondent to forbear paying the proper rate to employees not then in the unit sought commencing Labor Day 1991, or announcing that it would so do, when the evidence is convincing that Velardo did not act as he did in this instance because the election was pending or he had antiunion feelings. I am persuaded that here he was acting in good faith to correct an erroneous practice not of his doing simply because he discovered the practice was at odds with Respondent's published policy.

The decision and announcement that there would be a retroactive payment to affected dual-raters is another matter. This decision and announcement were both made after the Union and Respondent agreed to a unit including the dual-raters. There is no compelling evidence that the announcement, and payment or even the decision, could not have been delayed until after the election because the employees would have received the same amount after the election as before. As General Counsel fairly notes, the failure of Respondent to show why the announcement could not have been delayed indicates the announcement was improperly motivated.[34] Velardo clearly was not convinced, when he advised Ruggieri of the way holiday pay would be computed in the future, that dual-raters were entitled to backpay for past holidays where the computation had been in error. Moreover, when Velardo met with the dual-raters after the signing of an election agreement he, by his own testimony, had not yet made a decision on the retroactive payment, and only did so after soliciting employee input on the matter. Why he would so solicit when he well knew they were not being paid in the manner prescribed by Respondent's employee manual is inexplicable. If employees should have been paid a certain way, as Velardo recognized by announcing future adherence to the manual formula, it is obvious that previous pay at a lesser rate was wrong.[35] In the circumstances, Velardo's explanation that he was still investigating past understandings concerning how the holiday pay for dual-raters should have been computed is not convincing in the absence of any evidence, other than Casteneda's advice which Velardo had previously rejected, that the holiday pay should ever have been computed in a manner contrary to the manual's clear instruc-

[29] Tr. pp. 309–311.

[30] *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

[31] *McCormick Longmeadow Stone Co.*, 158 NLRB 1237, 1242 (1966).

[32] 148 NLRB 970, 973 (1964).

[33] See, e.g., *Phillips Industries*, 295 NLRB 717, 731 (1989), and *Playboy Hotel & Casino*, 281 NLRB 1181, 1187 (1986).

[34] *Wm. T. Burnett & Co.*, 273 NLRB 1085, 1092 (1984).

[35] The date of the issuance of the manual is not in evidence, but it would seem to logically follow that if Respondent paid retroactive pay to March 1988 as it did, the manual provision at issue was then in existence.

tion.[36] Respondent has not shown that the timing of the decision or announcement concerning the retroactive pay was required by factors other than the pendency of the election. Accordingly, I find the decision and announcement were motivated by a desire to create a friendly feeling by the dual-raters, then included in the bargaining unit sought, toward Respondent and thus influence them to vote against union representation in the upcoming election. This conduct violated Section 8(a)(1) and (3) of the Act.

THE OBJECTIONS

The objections to conduct affecting the results of election filed by the Union read as follows:

> 1. On or about August 20, 1991, in meeting with employees at the Hotel/Casino, the Respondent, acting through William Velardo, (a) solicited its employees complaints and grievances, thereby promising them improved terms and conditions of employment in order to discourage them from selecting the Union as their bargaining representative; (b) promised to resolve an employee's complaint concerning Pit Bosses ''sweating money'' in order to discourage the employees from selecting the Union as their bargaining representative; and (c) promised to provide employees with better scheduling arrangements in order to discourage the employees from selecting the union as their bargaining representative.
>
> 2. On or about September 9, 10, and 11, 1991, the Respondent, acting through William Velardo and Craig Keyser, in meetings with employees at the Hotel/-Casino: (a) threatened to institute a non-tipping policy for its employees if they selected the Union as their bargaining representative; and (b) threatened to discontinue the Respondent's practice of allowing part-time employees to ''pick up days'' from full-time employees.
>
> 3. During the period from July 17, 1991, to September 20, 1991, the Respondent interfered with employees' distribution of Union literature by engaging in the following acts and conduct:
>
> (a) Acting through Dante Benevenuto, Marian Warner, Frank Shapiro and other Pit Bosses whose names are presently unknown to the General Counsel, refused to allow Union literature in the pits while permitting anti-Union literature to remain in the pits.
>
> (b) On or about September 3, 1991, acting through Frank Shapiro, (i) followed an employee who was distributing Union literature in the dealers' lounge; (ii) removed Union literature left by the employees in the dealers' lounge; (iii) removed Union literature from the bulletin board in the dealers' lounge while permitting anti-Union literature to remain the dealers' lounge; and (iv) interrogated an employee concerning the employee's Union activities.
>
> (c) In early September, 1991, a more precise date being presently unknown to the General Counsel, acting through Marian Warner, removed Union literature from the dealers' lounge while permitting anti-Union literature to remain in the dealers' lounge.
>
> (d) On or about September 10, 1991, acting through Thomas Sparks and one of the Respondent's security guards whose name is presently unknown to the General Counsel, on two occasions, directed employees who were on the sidewalk near the employee entrance to the Hotel/Casino to cease distributing Union literature.
>
> 4. On or about August 1, 1991, the Respondent, acting through William Bradshaw, in the Hotel/Casino threatened an employee that the Respondent would eliminate the ''dual-rate'' position if the employees selected the Union as their bargaining representative.
>
> 5. In the first two weeks or September, 1991, a more precise date being presently unknown to the General Counsel, the Respondent, acting through Dante Benevenuto, solicited an employee's complaints and grievances, thereby promising its employees improved terms and conditions of employment in order to discourage its employees from selecting the Union as their bargaining representative.
>
> 6. On or about September 15, 1991, the Respondent granted retroactive holiday backpay for dual-rate employees in order to discourage them from selecting the Union as their bargaining representative.

I have found matters covered by Objections 3(a), (b), (c), and (d) and 6 to be unfair labor practices occurring during the critical period between the petition and the election in Case 4–RC–17676, *Ideal Electric Co.*, 134 NLRB 1275 (1961); *Goodyear Tire Co.*, 138 NLRB 453 (1962). Unfair labor practices constitute objectionable preelection conduct, *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). Objections 3(a), (b), (c) and (d) and 6 are sustained and are sufficiently serious, considering the narrow margin between the ballots cast for and against the Union in that election, to require the election be set aside. The remaining objections to election are overruled consistent with my findings on the alleged unfair labor practices paralleling these objections.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing a rule prohibiting off-duty employees from distributing union literature in nonworking areas where there is no justifiable business reason therefor, Respondent violated Section 8(a)(1) of the Act.

4. By monitoring the union activity of an employee, Respondent violated Section 8(a)(1) of the Act.

5. By removing prounion literature from nonwork areas while permitting antiunion literature distributed by employees to remain in those areas, Respondent violated Section 8(a)(1) of the Act.

6. By refusing to permit an employee to place prounion literature in a work area where the placement of antiunion

[36] Velardo concedes that his research prior to his meeting with the group of dual-raters did not find ''a single shred of evidence'' the dual-raters should ever have been paid in any way expect that appearing in the company handbook.

literature by employees was tolerated, Respondent violated Section 8(a)(1) of the Act.

7. By interrogating an employee concerning where he was going to engage in union activities, Respondent violated Section 8(a)(1) of the Act.

8. By granting retroactive holiday pay to employees during the pendency of a representation election for the purposes of discouraging union support and inducing the employees to vote against the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

9. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent engaged in objectionable conduct requiring that the election conducted on September 20 and 21, 1991, in Case 4–RC–17676 be set aside.

[Recommended Order and Direction of Second Election omitted from publication.]